90-636

No. (1)

In the Supreme Court

OF THE

United States

Supreme Court, U.S.
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OCTOBER TERM, 1990

PETER MALCOLM DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I.

Is Title 46, United States Code, section 1903(j), constitutional in that it allows nearly universal jurisdiction over vessels on the high seas?

II.

Does the government have statutory or other authority to board a foreign vessel on the high seas?

III.

Does the Fourth Amendment apply to searches of foreign vessels on the high seas?

IV.

Does the captain of a vessel have standing to challenge the search of his vessel?

OTHER PARTIES

The captioned parties are the only parties to the appeal. Wayne Biermann, Steven Preston King, and Birgit Ursula King were charged with Peter Malcolm Davis in the indictment but have not appealed.

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OCTOBER TERM, 1990

PETER MALCOLM DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Peter Malcolm Davis petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The District Court decision, *United States v. Biermann,* can be found at 678 F.Supp. 1437 (N.D.CA 1988) (Appendix A). The Ninth Circuit decision, *United States v. Davis,* No. 88-1446, has been approved for publication but has not yet been published (Appendix B). The Order denying a rehearing was dated July 6, 1990 (Appendix C).

JURISDICTION

On May 21, 1990, the Court of Appeals affirmed the District Court conviction. The judgment of the Court of Appeals (Appendix B) was entered on July 25, 1990. Peter Malcolm Davis'

petition for rehearing was denied on July 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

DOCUMENTARY AUTHORITY

This case involves a Fourth Amendment (Appendix D) and jurisdictional challenges to a conviction under 46 U.S.C. 1903 (Appendix E). Claims of jurisdiction are based upon the British/United States Narcotic Drugs: Interdiction of Vessels Agreement (Appendix F) and a telex from David McMillan, British First Secretary for Aviation and Shipping, sent June 16, 1987 (Appendix G).

STATEMENT OF THE CASE

A. Factual Background

At about 4:35 p.m. on June 15, 1987, while conducting a law enforcement patrol off the Northern California coast, the Coast Guard Cutter "Cape Romain" (hereinafter "Romain") encountered the British sailing vessel "Myth of Ecurie" (hereinafter "Myth") approximately 35 nautical miles southwest of Point Reyes, California. The "Myth" is a sailing vessel, white in color, approximately 58 feet in length with wooden trim and deck and a white pilot house. The masts are a light brown color, known as spar. The vessel was equipped with a radar and two other antennas. A home port of Channel Island, United Kingdom, was displayed on the stern. When initially sighted, the "Myth" was on an easterly course; however, as the "Romain" approached, the "Myth" altered its course to the south.

At approximately the same time the "Romain" approached the "Myth," its master, petitioner Davis, initiated communications, calling the "Romain" and stating that the "Myth" was of British registry, that they were in international waters, and that the "Romain" had no jurisdiction over them.

Lieutenant (J.G.) Paul F. Thomas, the Commander of the "Romain," then checked to determine if the "Myth" was on the El Paso Intelligence Center (EPIC) narcotics lookout list which

is carried on the Coast Guard vessel. The "Myth" was listed as a vessel on the EPIC list suspected of narcotics smuggling.

At approximately 4:55 p.m., the "Romain" requested permission to conduct a consensual boarding. Personnel on the "Myth" denied the request. The "Romain" then asked where the vessel was bound and the "Myth" responded that their last port of call was Hong Kong and that they were en route to San Francisco due to engine problems. The "Romain" crew volunteered to assist with the engine problems. That offer was refused. Shortly thereafter, the "Myth" responded that their engine problems had been repaired and that they were bound for the Caribbean by way of Mexico.

At approximately 6:00 p.m., the "Romain" requested a statement of no objection from the British government to a boarding of a foreign vessel from the Commandant, United States Coast Guard, in order to board the "Myth." While awaiting word from the Commandant during the evenings of June 15 and 16, upon orders from the Commandant, the "Romain" followed the "Myth" on its southerly course.

On June 16, 1987, David A. McMillan, British First Secretary for Aviation and Shipping, on behalf of the government of the United Kingdom, agreed not to object to United States boarding, searching and if necessary seizing the "Myth," as long as the United States complied with a 1981 Interdiction Agreement. The Commandant of the Coast Guard notified the "Romain" by radio that a statement of no objection to law enforcement action against the "Myth" had been issued.

Thereafter, at about 8:50 a.m. on June 16, the "Romain" ordered the "Myth" to heave to and prepare to be boarded. As the boarding party came aboard, they mustered the crew on the stern and identified them as Peter Malcolm Davis, a British national and United States resident; Wayne Biermann, a Bermuda national; Steven Preston King, a United States national; and Birgit Ursula King, a German national.

Boatswain's Mate Samuel N. Anthony and the master of the "Myth," Peter M. Davis, went to the cabin, where Anthony smelled marijuana. Anthony asked if there were any weapons on

board. Petitioner Davis stated that he had a shotgun down below and started down the ladder to get it. Anthony stopped him and both of them went below together. Below deck, Anthony found a quantity of marijuana. Petitioner Davis and the crew were arrested.

B. Course of Proceedings

Petitioner Peter Malcolm Davis was indicted with Wayne Biermann, Steven Preston King and Birgit Ursula King on June 24, 1987, in a two-count indictment. In Count One, the defendants were charged with violating Title 46, United States Code, section 1903(a) (possession of marijuana on the high seas on board a vessel subject to the jurisdiction of the United States). In Count Two, the defendants were charged with violating Title 46, United States Code, section 1903(j) (conspiracy to possess marijuana on the high seas on board a vessel subject to the jurisdiction of the United States).

The defendants filed several pretrial motions, including one to suppress evidence and dismiss indictment. On November 6, 1987, the Honorable Charles A. Legge, United States District Judge, ordered an evidentiary hearing on whether the Coast Guard reasonably believed that the "Myth of Ecurie" was engaged in drug importation into the United States. On December 15, 1987, Judge Legge, on motion by the government, vacated the order for an evidentiary hearing. Judge Legge filed a written order. *United States v. Biermann*, 678 F.Supp. 1437 (N.D.CA 1988).

Trial was held, using a set of stipulated facts, before the Honorable Charles A. Legge. Judge Legge made a finding of guilty.

On November 2, 1988, Peter Malcolm Davis was sentenced to ten years and four years of supervised release on Count One. On Count Two, the sentence was suspended.

On May 21, 1990, the Ninth Circuit Court of Appeals affirmed Peter Malcolm Davis' conviction. On July 6, 1990, the Ninth Circuit denied petitioner Davis' motion for reconsideration. In petitioner Davis' brief and in oral argument by counsel before the Ninth Circuit, petitioner Davis relied *inter alia* upon *United*

States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988). After oral argument but prior to the Ninth Circuit's decision in this case, the Supreme Court reversed *Verdugo-Urquidez*, ___ U.S. ___, 110 S.Ct. 1056, 1061 (1990).

Peter Malcolm Davis is currently on appeal bond.

REASONS FOR GRANTING THE PETITION

This case involves significant questions regarding constitutional rights, jurisdiction and international relations. It involves the rights of resident aliens to challenge a search on the high seas and the applicability of the Fourth Amendment to said search.[1] Such searches are becoming more and more common. There is a real need, both practically and for notice under the Due Process Clause, for this Court to consider the issue and to provide a unified answer since the various Courts of Appeal differ considerably on the issue.

It involves significant questions regarding jurisdiction and the interpretation of the British/United States Narcotic Drugs: Interdiction of Vessels Agreement. Furthermore, it involves an opportunity for this Court to settle a split in the Circuits regarding the method of interpretation of statutes in light of international law.

The Ninth Circuit bases its holding that the Fourth Amendment does not apply to the search of the "Myth of Ecurie" on *United States v. Verdugo-Urquidez*, ___ U.S. ___, 110 S.Ct. 1056. The holding in *Verdugo-Urquidez* is that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a non-resident and located in a foreign country." *Id.* at 1059.

Unlike *Verdugo-Urquidez*, Peter Davis is a lawful resident of the United States with "voluntary attachments" to the nation. *Id.*

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[1] As was pointed out in the Petition for Rehearing, the Court erroneously referred to Peter Davis as a non-resident alien. Slip Op. at 5147. Davis is a lawful resident of the United States, residing in Florida with his wife, a citizen of the United States.

at 1066. Aliens in this country are protected by the Fourth Amendment. *Au Yi Lau v. U.S. Immigration & Naturalization Service,* 445 F.2d 217, 223 (D.C. Cir. 1971); *United States v. Barbera,* 514 F.2d 294, 296, n.3 (2nd Cir. 1975); *United States v. Cristancho-Puerto,* 475 F.2d 1025, 1029 (5th Cir. 1973) (Simpson, dissenting). *See also Almeida-Sanchez v. United States,* 413 U.S. 266, 267, 37 L.E. 5962, 93 S.Ct. 2535 (1973); *International Ladies Garment Workers Union, et al. v. Sureck, et al.,* 681 F.2d 624, 634-635 (9th Cir. 1982). Even illegal immigrants are protected by the Fourth Amendment. *I.N.S. v. Lopez-Mendoza,* 468 U.S. 1032, 1050 (1984). Certainly Peter Davis, who is a legal resident with a green card, is entitled to the benefits provided by the Fourth Amendment.

The refusal of the Ninth Circuit to apply the Fourth Amendment to the search of the "Myth of Ecurie" violates a long tradition, not only in the Ninth Circuit,[2] but also in the First,[3] Second,[4] Fifth,[5] and Eleventh[6] Circuits.

The Ninth Circuit decision gives the Executive Branch of the government nearly unlimited power to search any vessel in any ocean anywhere in the world. Not only does it deny the applica-

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[2] *See United States v. Peterson,* 812 F.2d 486, 489 (1987), assuming but not finding that the Fourth Amendment applied to a search of a Panamanian vessel on the open seas.

[3] *See United States v. Hensel,* 699 F.2d 18, 24 (1983), recognizing that the exclusionary rule applies to searches by American agents on the high seas.

[4] *See United States v. Streifel,* 665 F.2d 414 (1981), claiming that the Fourth Amendment applies equally to searches by American agents on land and on sea in a case involving a Panamanian vessel in international waters.

[5] *See United States v. Williams,* 617 F.2d 1063, 1078 (1980), which states, "[c]ertainly, a seizure and search of a foreign vessel is also subject to the Fourth Amendment."

[6] *See United States v. Marino-Garcia,* 679 F.2d 1373, 1384-86 (1982), applying a Fourth Amendment analyses to a search of a flagless ship on the high seas.

bility of the Fourth Amendment, but it also denies the applicability of international law. This creates a conflict with the view of the First Circuit. Unlike the Ninth Circuit, which dismisses the validity of international law,[7] the First Circuit in ruling on the validity of a search conducted pursuant to 14 U.S.C. 89(a), which authorizes the Coast Guard to conduct searches and seizures in limited situations upon the high seas, states:

> [4,5] (a) We agree that § 89(a) does not authorize searches that violate international law. The rule is well established, at least since the time of Chief Justice John Marshall, that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."
>
> * * *
>
> Congress wished to authorize the search of vessels on the high seas to the extent such searches conformed to international law, but there is no indication that it wished to go further.
>
> *United States v. Hensel,* at 27.

It is international law which provides the framework for giving a sovereign state the right under limited circumstances to seize and search vessels on the high seas. *See Chua Han Mow v. United States,* 730 F.2d 1308, 1311 (9th Cir. 1984). It is true the British can consent to jurisdiction (which should not be confused with consent to search the vessel), but such consent is only valid if the United States fulfills any condition placed thereon by the British. This Agreement provides as follows in relevant part:

> 1. The Government of the United Kingdom of Great Britain and Northern Ireland agree that they will not object to the boarding by the authorities of the United States, outside the limits of the territorial sea and contiguous zone of the United States and within the area described in paragraph 9 below, of private vessels under the British flag *in any case in*

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[7] "International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts." Slip. Op. at 5141, n.1.

which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States in violation of the laws of the United States.

2. On boarding the vessel, the authorities of the United States may address enquiries to those on board, examine the ship's papers and take such other measures *as are necessary to establish the place of registration of the vessel. When these measures suggest that an offence against the laws of the United States relative to the importation of narcotic drugs is being committed, the Government of the United Kingdom agree that they will not object to the authorities of the United States instituting a search of the vessel.*

3. If the authorities of the United States then believes that an offence against the laws referred to in paragraph 2 above is being committed, the Government of the United Kingdom agree that they will not object to the vessel being *seized* and taken into a United States port.

* * *

6. *Any* action by the authorities of the United States *shall* be taken *in accordance with this Agreement and United States law.*

7. In any case where a vessel under the British flag is boarded the authorities of the United States shall promptly inform the authorities of the United Kingdom of the action taken and shall keep them fully informed of any subsequent developments.

Appendix F (emphasis added).

This provision must, to be meaningful, require (a) that such a reasonable belief exists and (b) that the basis thereof be submitted to the appropriate British officials to decide whether "not to object" under this Agreement.

In the instant case, both of these requirements were clearly violated. First, there is no suggestion in any materials known to us that the authorities had such a "reasonable" belief. For all that appears, the Coast Guard simply thought it prudent to have a look

around the ship, for no reason other than its proximity to United States waters. Clearly, the British/United States Agreement requires more in the way of reasonableness than this kind of unfocused fishing expedition. Second, even assuming, *arguendo,* that reasonable grounds to board the ship did exist, there is no indication that these grounds were communicated to Mr. McMillan, in accordance with the Agreement. The conclusionary manner in which Great Britain's "non-objection" is stated does little to dispel the clear impression that no basis for the Coast Guard's boarding were placed before Mr. McMillan.

Even where paragraph 1 of the Agreement is complied with—that is, reasonable grounds to board, communicated to the United Kingdom, followed by the United Kingdom's communication or its lack of objection—the Agreement permits only the *boarding* of the vessel and limited inspection to determine its place of registration. Only where these inquiries suggest that "an offense against the laws of the United States relative to the importation of narcotic drugs is being committed," does the Agreement contemplate that a search of the vessel will not be objectionable. In the present case, this limited inspection was unnecessary, since the Coast Guard had confirmed the ship's British registry prior to boarding.

Further, the United States officials failed to comply with the Agreement by seeking permission to search the vessel, once the boarding was effected. In this respect, we invite the Court's attention to the careful wording of the Agreement, which sets forth the circumstances under which the United Kingdom will not object to (1) boarding and inspection; (2) search; and (3) enforcement of United States laws on board the vessel, in that order. The Agreement thus does no more than set forth conditions under which the responsible British official (in this case, Mr. McMillan) will not object to these incremental increases in the exercise of United States power over British flag vessels on the high seas. It does not constitute a prospective authorization for the unilateral exercise of such powers in any case in which United States officials think the conditions are met. Rather, the Agreement contemplates that, at each stage of the pre-boarding and post-boarding process, the United States will communicate the basis

for its contemplated action to the British authorities, who will then communicate their lack of objection provided the requisite conditions specified in the Agreement are satisfied.

Under this analysis, the Agreement was apparently repeatedly violated as the boarding and search process was accomplished. As we have previously noted, it was incumbent upon United States officials to communicate to the British their "reasonable grounds" to believe that the "Myth of Ecurie" carried illegal drugs bound for the United States. Having boarded the vessel and determined that a full search was justified, it was then incumbent upon these officials to communicate this determination, and its basis, to the British in order to obtain the informed consent (or "lack of objection") of the appropriate official. Similarly, following the search and discovery of alleged marijuana, the Agreement required that a waiver of British objection to enforcement of United States law be obtained.

None of these vital steps were carried out. On the contrary, United States officialdom apparently obtained some manner of general waiver from the British prior to boarding, without any specification of their "reasonable grounds" to do so,[8] and thereafter boarded, searched and arrested the defendants without further applications to the United Kingdom. These violations of the Agreement would invalidate the search even if reasonable grounds for the boarding had initially existed.

Finally, the Agreement clearly mandates that "any action" by United States authorities "shall" be carried out in accordance with both the Agreement and United States law. Petitioner contends that the prohibition against unreasonable searches and seizures contained in the first clause of the Fourth Amendment applies to the seizure of the "Myth of Ecurie." Initially, we point out that the Coast Guard did not have statutory authority to stop (seize) and board the vessel. Title 14, United States Code,

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[8] As we have previously urged, no such reasonable grounds existed at the time of the boarding; thus, it is hardly surprising that none were communicated to the flag nation.

section 2, establishes the primary duties of the Coast Guard.[9] In *United States v. Ramsey,* 431 U.S. 606 (1977), the Supreme Court decided whether the search of envelopes mailed from Thailand violated the Fourth Amendment. The Court first inquired whether there was any statutory authority for the search and, secondly, "whether the search, nevertheless, violated the Constitution." *Id.* at 615. Relying on the historical acceptance of the statute and similar "border search" statutes as "reasonable" under the Fourth Amendment, the Court held that the search was constitutional. *Id.* at 615.

Using the *Ramsey* two-step analysis, the Fifth Circuit in *United States v. Williams,* at 1075-1076, proceeded to analyze whether 14 U.S.C. § 89(a) authorized the Coast Guard to search foreign vessels on the high seas. Noting that the statute was not limited on its face to American flag vessels, the *Williams* Court explained that the jurisdiction of the United States embraces offenses that may have an effect within its sovereign territory, even though the acts that constitute the offense occur outside the territory, and therefore, those who commit the offenses are "subject to . . . the operation of [the laws] of the United States." *Id.* at 1076.

The Court then went on to state:

> The two-part structure of the Supreme Court's analysis in *Ramsey* implies that a warrantless seizure or search in the complete absence of authority—a lawless governmental intrusion—is unconstitutional *per se . . . In other words, if the government can point to no authority for a challenged search or seizure, a court must conclude, without any further consideration, that the search and seizure was unconstitutional."* *United States v. Williams,* at 1074 (emphasis added).

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[9] Section 2 provides in pertinent part: "The Coast Guard shall enforce or assist in the *enforcement of all applicable federal laws on and under the high seas and waters subject to the jurisdiction of the United States;* shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States . . ."

It is clear that this requisite "authority" is lacking in the present case. Surely, such authority cannot be found in the Agreement of November 18, 1981 because, as we have shown, United States officials repeatedly and fundamentally violated that Agreement. Coast Guard officials acted on nothing more than an inchoate hunch—far less than the reasonable suspicion prescribed by the Agreement.

The Ninth Circuit limits its interpretation of the Agreement to its substantive sections: "[S]ince the telex states that the search be conducted according to 'the terms and conditions' of the 1981 Agreement, we deem the United Kingdom waived the jurisdictional provisions of the 1981 Agreement and we interpret only the 1981 Agreement's substantive provisions." Slip Op. at 5145, n.2.

However, in *United States v. Quemener,* 789 F.2d 145 (1986), the Second Circuit goes to considerable trouble to strictly construe a non-substantive section of the *same* agreement. The issue in *Quemener* is whether or not the British ship is within 150 miles of the coast. The Court found that the suspect ship was within 150 miles of the coast but the Court made clear that the Agreement must be meticulously followed. *Id.* at 149-153. Even if we assume that the telex authorized a search in the Pacific, the United States failed to comply with other significant sections of the Agreement and as a result jurisdiction does not exist to prosecute petitioner Peter Malcolm Davis.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: October 3, 1990.

Respectfully submitted,

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Appendix A

United States District Court
Northern District Of California

United States of America,
Plaintiff,

v.

Wayne Biermann,
Petre Malcolm Davis,
Birgit Ursula King, and
Steven Preston King,
Defendants.

No. CR-87-0473-CAL

Filed February 9, 1988

OPINION AND ORDER

This case involves the Coast Guard's search and seizure on the high seas of a vessel registered in the United Kingdom and operated by citizens of four different countries. The vessel contained several tons of marijuana and its occupants were indicted for possession of marijuana with intent to distribute it.

Defendants have moved for (1) dismissal of the indictment, on the ground of lack of jurisdiction; (2) suppression of the evidence which was obtained from the search and seizure of their vessel; (3); an evidentiary hearing on those motions; and, (4) the production of additional evidence by the government for the purpose of that evidentiary hearing. The government has opposed all of the motions.

By stipulation, this case has been designated as a complex case for purposes of the Speedy Trial Act, under 18 U.S.C. § 3161(h)(8)(B)(ii). The government has produced to defendants most of the discovery previously requested by them. Defendants then made these pending motions.

This court initially granted defendant's request for an evidentiary hearing. However, on the motion of the government, the court is reconsidering whether an evidentiary hearing is necessary and is addressing the legal issues raised by defendants' motions.

The court has received supplemental briefs and declarations from defendants and the government. The court has reviewed the record, the moving and opposing papers, and the applicable authorities.

The court concludes, for the reasons of law discussed below, that defendant's motion to dismiss for lack of jurisdiction and motion for suppression of evidence must be denied. Because these rulings are made as a matter of law based upon the uncontested record, an evidentiary hearing is not necessary and the further production of evidence by the government is not necessary.

I.

FACTS

For purposes of this motion, the relevant facts are uncontested in the record.

The Myth of Ecurie ("Myth") is a sailing vessel registered in the United Kingdom and flying the flag of the United Kingdom. The boat's home port in the United Kingdom was displayed on the stern. One of the defendants is a United Kingdom citizen, one is a Bermuda citizen, one is a German citizen, and one is a United States citizen.

Defendants sailed the Myth from Hong Kong, across the Pacific to the west coast of the United States. On June 15, 1987 a United States Coast Guard cutter encountered the Myth about thirty-five nautical miles southwest of Point Reyes, California. The Myth was headed for San Francisco. Upon the approach of the cutter, the Myth's master and the Coast Guard engaged in radio conversation. The Coast Guard requested permission to conduct a consensual boarding of the Myth. The request was denied. The master of the Myth asserted that the Coast Guard had no jurisdiction, since the Myth was a boat of United Kingdom registry sailing in international waters.

The Coast Guard made certain observations about the Myth. Then apparently acting in compliance with procedures established in a 1981 agreement between the United States and the United Kingdom, the captain of the cutter requested from the govern-

ment of the United Kingdom a statement that the United Kingdom did not object to the Coast Guard boarding the Myth. The United Kingdom replied by teletype that it would not object to the boarding, search and seizure of the Myth by the Coast Guard under the terms of that agreement.

On June 16, the Coast Guard boarded the Myth. At the time of the boarding, the Myth was located over 100 miles west of the California coast. The Coast Guard boarding officer smelled marijuana when he came aboard the Myth. The master of the Myth and boarding officer went below to obtain any weapons. The boarding officer there saw numerous bails of material in plain view and noticed the heavy smell of marijuana. When the boarding officer asked the master what was in the bails, the master replied that it was marijuana. The Myth and defendants were then brought to the Coast Guard station on Yerba Buena Island in San Francisco Bay and were placed under arrest. The marijuana aboard the Myth totaled over 7,000 pounds, stored in 236 bails.

While certain other evidence regarding the Myth, the cutter, and the dealings between them are in dispute and are mentioned later, those disputes need not be resolved for purposes of ruling upon defendants' motions. The above record is uncontested and is all that is necessary for the rulings of law on jurisdiction and suppression.

II.

INDICTMENT

On June 24, 1987 a federal grand jury indicted defendants. Count one charges a violation of 46 U.S.C. § 1903(a), the knowing and intentional possession, with the intent to distribute, of in excess of three tons of marijuana. Count two charges a violation of 46 U.S.C. § 1903(j), a combination, conspiracy and agreement among defendants and others to possess marijuana with the intent to distribute it. The indictment does not charge defendants with importation or the intent to import.

III.

MOTIONS

Defendants' principal motion is that the indictment should be dismissed for lack of jurisdiction. Their argument is that those criminal statutes of the United States cannot apply to persons on foreign vessels outside of the territory of the United States.

Defendants also move to suppress the evidence obtained from the search and seizure of the Myth. Their arguments in that regard are primarily two. One is that the Coast Guard's request to the United Kingdom for permission to board and search the Myth was not in compliance with the 1981 agreement between the United States and the United Kingdom. The second is that the search and seizure were in violation of the Fourth Amendment of the United States Constitution. As stated, defendants also request an evidentiary hearing on those issues and have requested the further production of evidence by the government in that regard.

The court will discuss each of those issues in order.

IV.

JURISDICTION UNDER THE APPLICABLE STATUTES

Do these criminal statutes of the United States, 46 U.S.C. §§ 1903(a) and (j), apply to persons on a foreign flag vessel in international waters?

46 U.S.C. § 1903 is part of Chapter 28 of the Shipping Code. That chapter expressly deals with "*Maritime* Drug Law Enforcement." (emphasis added). The statute was originally passed in 1980, then as Section 995c of Title 21, regarding food and drugs. The section was enacted to fill a void left by the Comprehensive Drug Abuse Prevention and Control Act of 1970, which superceded prior drug enforcement legislation but inadvertently omitted to replace the provision under which drug offenders apprehended on the high seas were prosecuted. *See* S. Rep. No. 855, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 2785.

The section was amended in 1986 and restated as Section 1903 of the Shipping Code. The Senate Report pertaining to that amendment stated that, under the statute before its amendment, some defendants had successfully resisted prosecution by "relying heavily on international jurisdictional questions as legal technicalities." S. Rep. No. 530, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 5986, 6000. The amendment therefore included a provision prohibiting individual defendants from relying as a defense on the government's failure to comply with international law.

In 46 U.S.C. § 1902 Congress specifically found and declared

> that traffficking in controlled substances aboard vessels is a serious international problem and is universally condemned. Moreover, such trafficking presents a specific threat to the security and societal well-being of the United States.

It is clear from the language of Section 1903 that Congress intended to apply that penal statute not only to a United States flag vessel, but also to any vessel subject to the jurisdiction of the United States. Section 1903(a), the offense charged in count one of this indictment, provides that

> It is unlawful for any person on board a vessel of the United States, or on board *a vessel subject to the jurisdiction of the United States,* to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance. (emphasis added).

In subsection (c)(1) Congress specifically defined a "vessel subject to the jurisdiction of the United States" as including:

> (C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to enforcement of United States law by the United States;
>
> (D) a vessel located within the customs waters of the United States.

The term "customs waters" is defined in 19 U.S.C. § 1401(j)[1] to mean

> in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement . . .

Thus, the term includes the location of any vessel upon the high seas, so long as the United States government has obtained authorization, by way of treaty or other arrangement, from the vessel's flag nation.

Section 1903(j), the offense charged in count two of this indictment, also makes conspiracy to commit any offense defined by the chapter a crime.

The government asserts jurisdiction over the Myth and defendants under both subsections (C) and (D) of Section 1903(c)(1). Has the United Kingdom "consented or waived objection to enforcement of United States law by the United States," under subsection (C)? Was the Myth subject to a treaty or other arrangement between the United States and the United Kingdom enabling the United States to board, examine, search, seize, or otherwise enforce the laws of the United States on the high seas, under subsection (D) and 19 U.S.C. § 1401(j)?

The answer to these questions initially involves reference to the 1981 agreement between the United States and the United Kingdom. Defendants contend that the terms of the 1981 agreement were not followed, because in requesting the United Kingdom's consent to board the Myth, the Coast Guard did not have a

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[1] 19 U.S.C. § 1401(j) is an administrative provision of the Tariff Act of 1930. An identical definition of the phrase "custom waters" can be found in Chapter 3 of Title 19, which relates to the enforcement of smuggling laws. 19 U.S.C. § 1709(c). For the sake of convenience this opinion will refer to § 1401(j).

"reasonable belief" that the Myth was engaged in drug importation into the United States. The government disagrees. But more important to this motion, the government also contends that, even apart from the terms of the 1981 agreement, the consent given by the United Kingdom to the Coast Guard for the boarding of the Myth constituted an "arrangement" which brought the Myth within the customs waters of the United States under subsection D, and that the United Kingdom hereby "consented" or "waived objection" under subsection C.

The agreement between the United Kingdom and the United States is set forth in an exchange of notes on November 13, 1981. The notes state that their purpose is "to take more effective measures to suppress the unlawful importation of cannabis and other narcotic drugs into the United States." The British government acknowledged its regard for the need for international cooperation in suppressing the illicit traffic in narcotic drugs. The operative language of the agreement is that the United Kingdom

> will not object to the boarding by the authorities of the United States, outside the limits of the territorial sea and contiguous zone of the United States . . . of private vessels under the British flag in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States . . . .

Certain other substantive and procedural matters are set forth in the agreement. And it is important to note that there is no requirement in the agreement for the advance consent by the United Kingdom to any particular boarding.

It is questionable whether that agreement applies to this case. The agreement, in paragraph nine, defines the geographic areas in which the agreement is applicable. That definition does not include the waters of the Pacific Ocean. However, in this case the Coast Guard did request the consent of the United Kingdom to board the Myth. And in its reply telex, the United Kingdom gave its consent under the terms and conditions of the agreement.[2]

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[2] The telex said:

Assuming that the agreement applies to this case, defendants argue that its terms were not complied with because the Coast Guard did not have a "reasonable belief" that the Myth was importing drugs into the United States at the time of requesting the United Kingdom's consent. It is primarily on this issue that defendants request an evidentiary hearing. Defendants also argue that the 1981 agreement only covers *importation* offenses. However, it is the conclusion of this court that defendants lack standing to raise either of these issues.

First, the 1981 agreement sets forth in paragraphs four, five, seven, and eight the procedures and remedies. Those remedies refer only to rights and duties of the United Kingdom and the United States, and do not contain any inference that any private party has standing to object to actions of the United States or the United Kingdom under that agreement. Second, 46 U.S.C. § 1903(d) also indicates that defendants have no standing to object to any alleged deficiencies. That section states:

> A claim of failure to comply with international law in the enforcement of this chapter may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter.

Third, the legislative history of Section 1903 clearly shows that Congress intended to foreclose the type of arguments that defendants seek to make here. The Senate Report notes that, under prior law,

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"1. HMG HAS VERIFIED REGISTRY OF SUBJ VESSEL AND HAS AUTHORIZED USG TO BOARD, SEARCH AND SEIZE, IF EVIDENCE WARRANTS, UNDER U.S. LAW. HMG HAS INDICATED THAT THE CONDITIONS AND TERMS CONTAINED IN 13 NOV 81 US/UK AGREEMENT WILL BE USED IN THIS CASE.

2. IN VIEW OF THE ABOVE, COMDT HAS NO OBJECTION TO TAKING ACTION AGAINST SUBJ VESSEL UNDER THE TERMS OF THE US/UK AGREEMENT.

3. INSURE AMENBASSY LONDON IS INFO ADDEE ON ALL RELATED MSC TRAFFIC."

> defendants have been insisting at trial that the government present judicially admissible documentary evidence from the affected foreign nations to prove consent or denial of a claim of registry. These tactics have met with varying success, depending on the court. But prosecutors have had to go to great lengths to protect their cases from the possibility of an adverse ruling. . . .
>
> In the view of the Committee, only the flag nation of a vessel should have a right to question whether the Coast Guard has boarded that vessel with the required consent. The international law of jurisdiction is an issue between sovereign nations. Drug smuggling is universally recognized criminal behavior, and defendants should not be allowed to inject these collateral issues into their trials.

S. Rep. 530, 99th Cong., 2d Sess. 15-16, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5986, 6000-01.

Finally, defendants' lack of standing here is also consistent with a recent decision of the United States Court of Appeals for the Ninth Circuit. In *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987), the court was concerned with Section 955, the predecessor to Section 1903. The defendants there contended that the boarding of their ship violated their rights under international law. The Ninth Circuit denied that contention and held that the treaty involved there did not confer any rights on the litigants to suppress the evidence. The court said (page 492):

> The ramifications of a violation of international law are largely political, and any violation of international law here is only relevant as it informs our decision on whether the search was or was not in violations of our statutory and constitutional standards. The treaty is not self-executing in the sense that it confers individual rights on these litigants to suppress evidence. If the search was properly authorized, a violation of the treaty would not allow for exclusion of the evidence. *See U.S. v. Williams*, 617 F.2d 1063, 1089-90 (5th Cir. 1980). In

> any event, as we discuss below, Panama's consent [to the boarding] from the case.

See also U.S. v. Bent-Santana, 774 F.2d 1545, 1550 (11th Cir. 1985); *U.S. v. Hensel,* 699 F.2d 18, 30 (1st Cir. 1983).

This court concludes that it is unclear whether the Coast Guard was bound by the requirements of the 1981 agreement in requesting permission to board and seize the Myth. But even if those requirements were applicable because of the United Kingdom's reply, and even if the Coast Guard did not comply with them, only the government of the United Kingdom—and not these defendants—has the right to object.

The reach of the criminal statutes charged here is therefore governed by the language of subsections (C) and (D) of Section 1903(c)(1). The court concludes that under subsection (C) the United Kingdom expressly "consented or waived objection to enforcement of United States law by the United States;" and that under subsection (D) the Myth was located within the customs waters of the United States, as defined by 19 U.S.C. § 1401(j) because there was an "arrangement" with the United Kingdom enabling authorities of the Untied States to "board, examine, search, seize and otherwise enforce upon the high seas the laws of the United States." *U.S. v. Peterson,* 812 F.2d at 493, held that the consent of a foreign government brought the boarding of a ship within the customs waters of the Untied States.

In boarding the Myth, the Coast Guard was also acting under the statutory authority of 14 U.S.C. § 89(a). That section provides in relevant part that "The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." And the Coast Guard "may at any time go aboard any vessel subject to the jurisdiction, or to the operation of any law, of the United States."

The Fifth Circuit in *United States v. Williams,* 617 F.2d 1063, 1076 (5th Cir. 1980), held that Section 89(a) requires that the Coast Guard must act upon reasonable suspicion when it relies on the jurisdictional predicate that a foreign vessel on the high seas is

operating in violation of U.S. laws. This holding was noted by the Ninth Circuit in *U.S. v. Peterson,* 812 F.2d at 493. But the *Peterson* court stated that Section 89(a), in the context of enforcing the statutory predecessor of 46 U.S.C. § 1903, "specifically applies to the high seas and does not restrict the Coast Guard to actions based on reasonable suspicion or probable cause." *Id.* The Ninth Circuit, however, avoided a direct conflict with the Fifth Circuit by holding that the search in *Peterson* was conducted pursuant to a different jurisdictional predicate, *i.e.* that the vessel was boarded within the customs waters of the United States. *Id.* As this court has already discussed above, the Myth was also located in the customs waters of the United States within the definition of the applicable statutes.

This court therefore concludes that: the Myth was in the customs waters of the United States; the Coast Guard had authority to board the Myth without reasonable suspicion or probable cause under 14 U.S.C. § 89(a); the Myth and defendants are subject to United States jurisdiction under 46 U.S.C. § 1903(c)(1)(C) and (D); and 46 U.S.C. § 1903(a) and (j) do apply to the Myth and to defendants. That extension of jurisdiction is just what the U.S. Congress and the United Kingdom intended.

V.

JURISDICTIONAL LIMITATIONS UNDER THE CONSTITUTION

Defendants then contend that such an extension of the statutes of the United States to international waters, even with the consent of a foreign government, is an unconstitutional exercise of extraterritorial jurisdiction. Defendants argue that the U.S. Constitution, together with judicially developed doctrines of jurisdiction, preclude application of substantive United States criminal law to persons on foreign vessels outside of United States territory.

The constitutionality of Section 1903's predecessor statute, 21 U.S.C. § 955, has been upheld by several federal courts of appeal. *See United States v. Peterson,* 812 F.2d 486 (9th Cir. 1987); *United States v. Romero-Galue,* 757 F.2d 1147 (11th Cir. 1985).

The constitutional analysis in such cases begins with the proposition, discussed above, that in enacting Section 1903 Congress intended to assert jurisdiction to the maximum extent allowable under international law.

As a general matter, international law prohibits any country from asserting jurisdiction over foriegn vessels on the high seas. *See United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982). Defendants concede that this general rule does not apply if a "sufficient nexus" indicates that acts aboard the foreign vessel are lkely to have criminal consequences within the United States. *See Peterson*, 812 F.2d at 493; Restatement (Second) of Foreign Relations § 18. However, defendants argue that this exception is not present here, because the United States has not charged defendants with conspiracy to import a controlled substance, *see* 21 U.S.C. § 963, but rather has proceeded under Section 1903, which proscribes conspiracy and possession with intent to distribute. Whether the facts necessary to establish jurisdiction must also be the basis for the criminal violation ultimately charged, and whether those facts exist in this case, are however questions which need not be answered here. Rather, this court is of the opinion that established principles of protective jurisdiction support the extraterritorial reach of Section 1903.

The protective principle recognizes that a nation may assert jurisdiction over foreign vessels on the high seas that threaten its security or governmental functions, without the requirement of demonstrating an actual effect on the nation itself. *See Peterson*, 812 F.2d at 493-94; Restatement (Second) of Foreign Relations § 33 ("A state has jurisdiction to prescribe a rule of law attaching legal consequence to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems."). Congress has specifically found "that trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned. Moreover, such trafficking presents a specific threat to the security and societal well-being of the United States." 46 U.S.C. § 1902. The Ninth Circuit agreed in *U.S. v. Peterson*, 812 F.2d at 493-94.

International law is merely an aid to statutory interpretation; it does not create limitations on congressional power. In interpreting a statute, it is this court's duty to ascertain and give effect to the intent of the legislature. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). The congressional intent behind Section 1903 does reflect principles of international law. However, international law itself is not binding on Congress, which remains free to legislate with respect to extraterritorial conduct subject only to the limitations of the U.S. Constitution. *Rainey v. United States*, 232 U.S. 310, 316-17 (1914); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983).

Article one, section 8, clause 10 of the U.S. Constitution specifically confers upon Congress the power "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." The courts of the United States have not had many occasions to interpret this constitutional provision. However, this provision clearly and unambiguously grants to Congress the power to *define* felonies committed upon the high seas, and this is precisely what Congress has done in enacting Section 1903. This power of Congress supplements the grant of judicial jurisdiction over "all cases of admiralty and maritime jurisdiction." Article III, Section 2, Clause 1. *See United States v. Flores*, 289 U.S. 137, 149 (1933).

This court concludes that Section 1903 may constitutionally be applied to the boarding, seizure, and arrest of the Myth and defendants.

VI.

FOURTH AMENDMENT

Defendants also move to suppress the evidence obtained in the seizure of the Myth, arguing that it was illegally and unconstitutionally obtained. This motion challenges (1) the scope of the Coast Guard's authority to stop and search the Myth, and (2) the constitutionality of the search under the Fourth Amendment.

The Coast Guard's authority to stop and search the Myth derives from statute and from the agreement between the govern-

ments of the United States and the United Kingdom. This court has already concluded that the Coast Guard acted according to the statutory authorization of 14 U.S.C. § 89(a), and that such a stop and search does not require reasonable suspicion or probable cause. *U.S. v. Peterson*, 812 F.2d at 493. This court has also concluded that defendants lack standing to raise issues pertaining to the arrangements between the United States and the United Kingdom.

Therefore, the remaining issue is whether the search and seizure violated the Fourth Amendment. There is initially a serious question as to whether Fourth Amendment protections extend to the high seas. The Ninth Circuit said in *U.S. v. Peterson* that "[w]hile neither the Supreme Court nor this court has stated definitively the extent to which fourth amendment protections apply upon the high seas, it has been assumed to apply in our major decisions." 812 F.2d at 489 (citations omitted). The court expressly noted that it "is far from settled" whether the Fourth Amendment is fully applicable on the high seas. It was unnecessary to decide that issue in *Peterson*, because the court found that the Coast Guard had probable cause to stop, board, search, and seize the vessel at issue there, and probable cause is the highest level of suspicion that could be required if the Fourth Amendment were fully applicable. *Id.* This court will assume here that the Fourth Amendment does apply in this case.

The Fourth Amendment by its terms prohibits *unreasonable* searches and seizures. The Supreme Court has held that this provision protects an individual's reasonable expectation of privacy from certain kinds of governmental intrusion. *Katz v. United States*, 389 U.S. 347 (1967). The preferable method of protecting this privacy interest is to require the government to obtain a warrant before conducting a search. *Wong Sun v. United States*, 371 U.S. 471 (1963). However, under certain circumstances it is not reasonable to require law enforcement officials to obtain a prior warrant, and courts have upheld warrantless searches so long as the officers had probable cause to believe the search would yield evidence of crime, or if the search was necessary to ensure the safety of the officers or public. *See Vale v. Louisiana*, 399 U.S. 30 (1970) (search of vehicle after police witnessed drug

transaction between its occupants). In still other circumstances, courts have upheld searches based on less than probable cause, without regard to officer or public safety, if the search satifies a "balancing test," weighing protected privacy interests against legitimate governmental interests. *See United States v. Place*, 462 U.S. 696 (1983). These circumstances have usually involved law enforcement at the nation's borders or their functional equivalent, where the volume of activity is heavy, and requiring a high level of particularized suspicion would be unrealistic. *See United States v. Matinez-Fuerte*, 428 U.S. 543, 557 (1976).

In *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the Supreme Court upheld customs officials' warrantless, suspicionless boarding of a vessel in waters with ready access to the open seas, when the officials acted pursuant to statutory authority for the purpose of inspecting the ship's documents. The Supreme Court relied heavily on the fact that the statute which authorized the search was the "lineal descendant" of a statute enacted by the Congress that framed the Fourt Amendment. The Court also found that the government had a strong interest in ensuring compliance with documentation and customs laws, and that the intrusion involved—boarding the deck and "public areas" of the vessel—was slight. *Id.* at 592.

The Ninth Circuit has stated, in a context similar to that presented by this case, that "a minimal intrusion on protected privacy interests is measured by the balancing test, but a substantial intrusion . . . must satisfy the probable cause requirement of the Fourt Amendment." *United States v. Humphrey*, 759 F.2d 743, 746 n.2 (9th Cir. 1985). The Ninth Circuit has directly held that there is no legitimate expectation of privacy in the cargo hold of a vessel, *Peterson*, 812, F.2d at 494, and that the intrusion of entry on the publicly exposed deck area is minimal. *Humphrey, 759 F.2d at 746.*

The Ninth Circuit in *Humphrey* and the Supreme Court in *Villamonte-Marques* concluded that government officials needed neither reasonable suspicion nor a warrant before conducting the particular searches at issue there. These conclusions reflect the strenght of the governmental interests, balanced against the

relatively slight intrusion on individual interest in case of boats on the high seas.

The governmental interests are well defined by Congress. They are stated by Congress in 46 U.S.C. § 1902, in Section 2015 of Pub.L. 99-750, and in the 1981 agreement between the United States and the United Kingdom. Other often cited governmental interests on the high seas include safety and document inspections.

In balancing those governmental interests against intrusion on individual's Fourth Amendment interests, courts have consistently found the governmental interests to be greater than any intrusions on individuals who are on vessels at sea. Research has not disclosed any case where the search and seizure of a vessel was held to violate the Fourth Amendment if it did not violate or exceed some statutory authority. To the contrary, the reported cases have upheld searches on the high seas and have balanced the interests in favor of the governmental concerns. Those decisions include ones by the United States Supreme Court in *Villamonte- Marquez,* and the Ninth Circuit in *Humphrey* and *Peterson.* Those conclusions are particularly appropriate here, in light of both the broad principle of jurisdiction which is present and the strongly stated congressional objective.[3]

While the principles of *Villamonte-Marquez, Humphrey* and *Peterson* apply to this case, the inquiry cannot end there. The reason is that those cases were in part fact-specific, and the facts in this case are somewhat different. The principal difference is that there is no evidence in the record here that the boarding of the Myth was for the purposes of safety or document inspection. Indeed, the record indicates that the Myth was intercepted and boarded because the Coast Guard suspected that the Myth was carrying drugs. Does this difference in the facts change the conclusions reached in the above cases? This court thinks not.

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[3] *U.S. v. Williams,* 617 F.2d at 1081, stated that the constitutionality of a particular search should be considered in the light of the statute and other authority that permitted it.

The court first notes that the Coast Guard acted under the very broad boarding power given to it by Congress in 14 U.S.C. § 89(a), which power is not limited to safety and documents inspections. And obtaining the prior consent of the United Kingdom also acted as a restraint on any unfettered exercise of enforcement power over the Myth and defendants. This court need not here define what, or whether any, cause or suspicion is required by the Fourth Amendment for searches on the high seas. Such a definition is better left to an appellate court. Rather, in applying the balancing standard required by the Fourth Amendment, and determining whether the search and seizure were reasonable here, this court believes that the facts uphold the validity of the search and seizure under any standard.

The uncontested and relevant facts have been dicussed above. In addition, according to the declaration of the Coast Guard, the Myth was in an area where such sailboats are not usually seen. It was headed toward San Francisco. It was on a list of the El Paso intelligence Center as a vessel suspected of narcotics trafficking. According to the Coast Guard's declaration, the bow of the Myth was riding very low in the water, indicating that cargo was on board. And the Myth altered course after being encountered by the Coast Guard. Most of the facts are not challenged by defendants, either by declarations or in their request for an evidentiary hearing. But even if defendants were to present evidence and successfully challenge the accuracy of some of the Coast Guard's observations, the undisputed facts in the record compel the conclusion that the Fourth Amendment was not violated in the boarding of the Myth, under the principles of *Villamonte-Marquez, Humphrey* and *Peterson*.

Further, the undisputed facts demonstrate that upon the boarding of the Myth, there was no Fourth Amendment violation in the further search of the vessel. It is undisputed that the Coast Guard boarding party could smell marijuana. The boarding party asked about the presence of weapons, and when the master replied affirmatively, he and the boarding officer went below. The Coast Guard officer saw marijuana in plain view, and the master admitted that the cargo was marijuana. *See United States v.*

Cilley, 785 F.2d 651 (9th Cir. 1985); *United States v. Humphrey*, 759 F.2d 743 (9th Cir. 1985).

VII.

ORDER

For the reasons stated above[4] the court grants the government's motion for reconsideration of an evidentiary hearing, and ORDERS as follows:

1. Defendants' motion to dismiss the indictment for lack of jurisdiction is denied.

2. Defendants' motion for suppression of evidence obtained from the boarding, search, and seizure of the Myth Ecurie is denied.

3. Defendants' request for an evidentiary hearing on the above issues is denied.

4. Defendants' request for the production of further evidence for purposes of that requested hearing is denied.

5. Any further pretrial motions by defendants shall be filed by March 11, 1988.

6. The pretrial conference is scheduled for April 21, 1988, at 3:30 p.m.

7. The trial is set for May 9, 1988, at 9:00 a.m.

Dated: February 9, 1988.

CHARLES A. LEGGE
Charles A. Legge
United States District Judge

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[4] The court acknowledges the assistance of J. Daniel Sharp and Laurie Kullby in the preparation of this opinion.

Appendix B

Ninth Circuit Decision

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PETER MALCOLM DAVIS,
Defendant-Appellant.

No. 88-1446
D.C. No.
CR-87-0473-CAL
OPINION

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
August 15, 1989—San Francisco, California

Filed May 21, 1990

Before: Charles Wiggins and Alex Kozinski, Circuit Judges
and Alicemarie H. Stotler, District Judge.*

Opinion by Judge Wiggins

SUMMARY

Admiralty/Search and Seizure

Affirming the district court's judgment of conviction, the court of appeals held that the Maritime Drug Law Enforcement Act, 46 U.S.C. app. §§ 1903(a) and 1903(j), applies to

*Hon. Alicemarie H. Stotler, United States District Judge for the Central District of California, sitting by designation.

persons on foreign vessels outside the territory of the United States.

After being denied permission by appellant captain Peter Davis to board the 58-foot sailing vessel, the *Myth of Ecurie*, suspected of being a drug smuggling vessel of British registry, the Coast Guard requested and received permission to board from the United Kingdom, in accordance with procedures in a 1981 agreement between the two nations. Coast Guard crew members boarded the *Myth*. The boarding officer smelled marijuana in the cabin, and when he went below with Davis, the officer saw numerous bales of material which Davis admitted were marijuana. The Coast Guard arrested Davis and his crew and brought the *Myth* to Yerba Buena Island where over 7,000 pounds of marijuana were confiscated. The district court denied Davis' motion to dismiss for lack of jurisdiction and motion to suppress evidence found aboard the *Myth*. Davis appealed his convictions for possession of and conspiracy to possess marijuana on a vessel subject to the jurisdiction of the United States with intent to distribute it violation of the Maritime Drug Law Enforcement Act.

[1] Davis contended that the provisions of the Maritime Drug Law Enforcement Act do not apply to persons on foreign vessels outside the territory of the United States. [2] However, the Constitution gives Congress the power to define and punish piracies and felonies on the high seas. [3] Congress also explicitly stated that it intended the Act to apply extraterritorially. [4] In order to apply extraterritorially a federal criminal statute to a defendant without violating due process, there must be a sufficient nexus between the defendant and the United States. [5] Where an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction. The facts support the reasonable conclusion that Davis intended to smuggle contraband into the United States. [6] The court also found that the Act by its terms applies to Davis' conduct because section 1903(a) and

(j) proscribe possession of and conspiracy to possess marijuana with intent to distribute on board a vessel subject to the jurisdiction of the United States.

[7] The court held that the consent given in a telex by the United Kingdom satisfied the statutory requirement that the vessel be in customs waters [8] and the 1981 Agreement requiring that, in order to board a vessel of British registry, United States authorities must reasonably believe that the vessel has on board a cargo of drugs for importation into the United States.

[9] The court rejected Davis' claim that the search and seizure of the *Myth* violated the fourth amendment because the fourth amendment does not apply to searches and seizures of nonresident aliens on the high seas.

COUNSEL

Michael Stepanian, and C. Zadik Shapiro, Law Offices of Michael Stepanian, San Francisco, California, for the defendant-appellant.

Jeffrey W. Lawrence, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee.

OPINION

WIGGINS, Circuit Judge:

Peter Malcolm Davis appeals his convictions for possession of, and conspiracy to possess, marijuana on a vessel subject to the jurisdiction of the United States with intent to distribute in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. app. §§ 1903(a), 1903(j) (Supp. IV 1986).

The Coast Guard apprehended Davis on the high seas and he contests application of the Maritime Drug Law Enforcement Act to him. Furthermore, he alleges that the Coast Guard searched and seized his vessel in violation of the fourth amendment.

I. FACTS AND PROCEEDINGS

On June 15, 1987, the Coast Guard cutter *Cape Romain* encountered the *Myth of Ecurie* ("*Myth*"), approximately 35 miles southwest of Point Reyes, California. The *Myth* is a sailing vessel approximately 58 feet in length. The *Myth* was headed in the direction of San Francisco. The *Cape Romain* approached the *Myth*, and Coast Guard personnel by radio requested permission to board. Peter Davis, the captain of the *Myth*, denied the request. He stated that the Coast Guard had no authority to board his boat because it was of British registry and was sailing on the high seas having departed from Hong Kong. Captain Davis announced his intention to alter his course for the Caribbean by way of Mexico.

The Coast Guard suspected the *Myth* of smuggling contraband. Factors leading to that suspicion were that the El Paso Intelligence Center had included the *Myth* on a list of vessels suspected of drug smuggling; the *Myth* was sailing in an area in which sailing vessels were infrequently found; and the *Myth* appeared to be carrying cargo.

The Coast Guard then requested permission from the United Kingdom to board the *Myth* in accordance with procedures in a 1981 agreement between the United States and the United Kingdom. The Coast Guard informed the British officials of the circumstances which led the Coast Guard to believe the *Myth* contained contraband material. By telex message, the United Kingdom gave the Coast Guard permission to board the *Myth* according to the terms of the 1981 Agreement.

On June 16, 1987, crew members from the *Cape Romain* boarded the *Myth*. By that time, the *Myth* had sailed to a location approximately 100 miles west of the California coast. The boarding officer smelled marijuana in the cabin of the *Myth*. Davis informed the boarding officer that he kept a shotgun below deck, and Davis and the boarding officer went below to obtain it. Below deck, the boarding officer saw numerous bales of material and smelled marijuana. Davis admitted that the bales were marijuana. The Coast Guard then arrested Davis and his crew and brought the *Myth* to the Coast Guard station on Yerba Buena Island in San Francisco. The Coast Guard there confiscated over 7,000 pounds of marijuana from the *Myth*.

Davis is not a citizen of the United States.

On September 2, 1987, Davis filed a motion to dismiss for lack of jurisdiction and a motion to suppress evidence obtained from the *Myth*. The district court denied both motions. *United States v. Biermann*, 678 F. Supp. 1437 (N.D. Cal. 1988). On July 26, 1988, the district court found Davis guilty on stipulated facts. Davis timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

II. DISCUSSION

A. *LEGISLATIVE JURISDICTION*

[1] Davis contends that the provisions of the statute under which he was convicted, the Maritime Drug Law Enforcement Act, 46 U.S.C. app. §§ 1903(a), 1903(j), do not apply to persons on foreign vessels outside the territory of the United States. The question of whether the United States may punish Davis' conduct involves three issues: 1) whether Congress has constitutional authority to give extraterritorial effect to the Maritime Drug Law Enforcement Act; if so, 2) whether the Constitution prohibits the United States from punishing

Davis' conduct in this instance; and, if not, 3) does the Maritime Drug Law Enforcement Act apply to Davis' conduct?

[2] Whether Congress may give extraterritorial effect to the statute in question is an issue of law which we review de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). Whether application of a particular statute violates due process is a mixed question of law and fact which we review de novo. *Id.* at 1202.

1. *Congressional Authority to Give Extraterritorial Effect to the Maritime Drug Law Enforcement Act*

The Maritime Drug Law Enforcement Act, 46 U.S.C. app. § 1903(a) and (j) state:

> (a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.
>
> (j) Any person who attempts or conspires to commit any offense defined in this Act [46 U.S.C. app. §§ 1904] is punishable by imprisonment or fine, or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt of the conspiracy.

The United States Congress sits as a legislature of enumerated and specific powers. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). The Constitution gives Congress the power to "define and punish piracies and felonies on the high seas . . . ." U.S. Const. Art I, sec. 8, cl. 10. The high seas lie seaward of the territorial sea, defined as the three mile belt of sea measured from the low water mark. *United States v.*

Rubies, 612 F.2d 397, 402 n. 2 (9th Cir. 1979). We therefore find that the Constitution authorized Congress to give extraterritorial effect to the Act.

2. *Constitutional Restrictions on the United States' Authority to Punish Davis' Conduct*

We next examine what limitations exist on the United States' power to exercise that authority.

Contrary to Davis' assertions, compliance with international law does not determine whether the United States may apply the Act to his conduct.[1] Only two restrictions exist on giving extraterritorial effect to Congress' directives. We require Congress make clear its intent to give extraterritorial effect to its statutes. *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983). And secondly, as a matter of constitutional law, we require that application of the statute to the acts in question not violate the due process clause of the fifth amendment. *Thomas*, slip. op. at 303.

[3] In this case, Congress explicitly stated that it intended the Maritime Drug Law Enforcement Act to apply extraterritorially. 46 U.S.C. app. § 1903(h) (Supp. IV 1986) ("This section is intended to reach acts of possession, manufacture, or distribution outside the territorial jurisdiction of the United States"). Therefore, the only issue we must consider is whether application of the Maritime Drug Law Enforcement Act to Davis' conduct would violate due process.

[4] In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the

[1]International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts. *United States v. Thomas*, No. 85-5325, slip. op. at 304 (9th Cir. Jan. 10, 1990).

United States, *see United States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987), so that such application would not be arbitrary or fundamentally unfair.[2]

[5] In the instant case, a sufficient nexus exists so that the application of the Maritime Drug Law Enforcement Act to Davis' extraterritorial conduct does not violate the due process clause. "Where an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction." *Id.* The facts found by the district court in denying Davis' motion to dismiss for lack of jurisdiction support the reasonable conclusion that Davis intended to smuggle contraband into United States territory. At the time of its first detection, the *Myth* was 35 miles away from, and headed for, San Francisco. As the Coast Guard approached, the *Myth* changed its course for the Caribbean by way of Mexico, although the *Myth* was many miles from the Great Circle route from Hong

[2]Some of our previous decisions have discussed international law jurisdictional principles simultaneously with the constitutionality of Congress' exercise of jurisdiction. *See Peterson*, 812 F.2d at 494 (extraterritorial application of statute is justified by protective principle and is constitutional); *Chua Han Mow v. United States*, 730 F.2d 1308, 1312 (9th Cir. 1984) (extraterritorial application of statute is justified by objective territorial and protective principle and is constitutional), *cert. denied*, 470 U.S. 1031 (1985); *United States v. King*, 552 F.2d 833, 851-52 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (extraterritorial application of statute is justified by nationality and objective territorial principles and is constitutional); *United States v. Cotten*, 471 F.2d 744, 749 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973) (extraterritorial application of statute justified by objective territorial principle); *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961) (extraterritorial application of statute is justified by protective principle). International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process. *See, e.g., Peterson*, 812 F.2d at 493. However, danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?

Kong to Acapulco. The *Myth* is on a list of boats suspected of drug smuggling. It is unusual for a 58 foot sailing vessel to have sailed from the *Myth*'s asserted point of departure, Hong Kong. The foregoing evidence is sufficient to establish a nexus between the *Myth* and the United States. We therefore find that the Constitution does not prohibit the application of the Marijuana Drug Law Enforcement Act to Davis.

3. *Application of the Maritime Drug Law Enforcement Act to Davis' Conduct*

[6] We must next determine whether the Maritime Drug Law Enforcement Act by its terms applies to Davis' conduct. We hold that it does. Section 1903(a) and (j) proscribe possession and conspiracy to possess marijuana with intent to distribute on board a vessel subject to the jurisdiction of the United States. Section 1903(c)(1)(D) defines vessels subject to the jurisdiction of the United States as vessels "located within the customs waters of the United States." In the case of a foreign vessel, 19 U.S.C. § 1401(j) (1982) defines customs waters as follows:

> The term "customs waters" means, in the case of a foreign vessel subject to a treaty or some other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement.
>
> . . .

Prior to boarding the *Myth*, the Coast Guard obtained permission to board from the United Kingdom in a telex which allowed the United States Coast Guard to board, search and

seize the *Myth* in accordance with the terms of the 1981 Agreement.

[7] Whether the consent given by the United Kingdom constitutes an arrangement pursuant to section 1401(j) presents a question of law subject to de novo review. *See United States v. Bent-Santana*, 774 F.2d 1545, 1548 (11th Cir. 1985). We have held that informal arrangements can satisfy section 1491(j). *See, e.g., Peterson*, 812 F.2d at 493 (Panamanian consent by telex constituted an arrangement satisfying section 1491(j)). As long as the foreign government has made clear its indication of consent, the arrangement necessary to create customs waters around a specific vessel may be informal. *See United States v. Gonzalez*, 776 F.2d 931, 933 (11th Cir. 1985); *United States v. Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987). An arrangement is simply a settlement or adjustment and contemplates no particular form. *Gonzalez*, 776 F.2d at 936. Thus, even verbal, ad hoc consent by a vessel's flag country is sufficient to bring the vessel within the definition of customs waters. *See, Bent-Santana*, 774 F.2d at 1550; *Alomia-Riascos*, 825 F.2d at 771.

The telex sent by the United Kingdom stated:

> 1. HMG has verified registry of subj vessel and has authorized USG to board, search and seize, if evidence warrents [sic], under U.S. Law. HMG has indicated that the conditions and terms contained in 13 Nov 81 US/UK Agreemnt [sic] will be used in this case.
>
> 2. In view of the above, comdt has no objection to taking action against subj vessel under the terms of the US/UK Agreement.
>
> 3. Insure Amenbassy [sic] London is info addee on all related msc traffic.

Biermann, 678 F. Supp. at 1442 n. 2. We hold that the request for permission to board and the United Kingdom's reply telex constitutes an arrangement pursuant to section 1401(j). Therefore, Davis' vessel was located within the customs waters of the United States, and hence within its jurisdiction.

[8] Davis argues that the Coast Guard failed to conduct its search pursuant to the terms and conditions of the 1981 Agreement, thereby vitiating the consent given by the United Kingdom.[3] In order to board a vessel of British registry, the 1981 Agreement requires that authorities of the United States "reasonably believe that the vessel has on board a cargo of drugs for importation into the United States."

Reasonable suspicion must be based upon "specific articulable facts, together with rational inferences from those facts." *United States v. Reeh*, 780 F.2d 1541, 1544 (11th Cir. 1986). Reasonable suspicion turns on the totality of particular circumstances. *Id.* We hold that the Coast Guard had reasonable suspicion to believe that the *Myth* was importing drugs. The listing of the *Myth* as a boat suspected of smuggling, the *Myth*'s unusual location, its attempt to change course, and its lowered position in the water, indicating that it was carrying cargo, could reasonably lead a Coast Guard officer to believe the *Myth* was smuggling contraband. We thus find that the Coast Guard satisfied the conditions of the United Kingdom's consent.

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[3]At the outset, we note that a question exists as to whether the 1981 Agreement even applies to vessels found within the Pacific Ocean. *See Biermann*, 678 F. Supp. at 1442. However, since the telex states that the search be conducted according to "the terms and conditions" of the 1981 Agreement, we deem the United Kingdom waived the jurisdictional provisions of the 1981 Agreement and we interpret only the 1981 Agreement's substantive provisions.

B. *THE VALIDITY OF THE SEARCH AND SEIZURE OF THE MYTH*

Whether the Coast Guard acted lawfully in stopping, boarding, and searching the *Myth* is a mixed question of fact and law which we review de novo. *United States v. Dobson*, 781 F.2d 1374, 1376 (9th Cir. 1986). We uphold findings of fact the district court used in denying a motion to suppress unless they are clearly erroneous. *See United States v. Feldman*, 788 F.2d 544, 550 (9th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987).

Davis contends that the Coast Guard illegally stopped, boarded, and searched the *Myth*. The Coast Guard acted under valid statutory authority pursuant to 14 U.S.C. § 89(a), which states:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, . . . officers may go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

As discussed above, the United States had jurisdiction over the *Myth* because it was within the customs waters of the United States.

[9] Davis also contends that the search and seizure of the *Myth* violates the fourth amendment. We hold that the protections of the fourth amendment do not extend to the search of the *Myth* on the high seas. *See United States v. Verdugo-*

Urquidez, 110 S. Ct. 1056, 1061 (1990). Although *Verdugo-Urquidez* only held that the fourth amendment does not apply to searches and seizures of nonresident aliens in foreign countries, the analysis and language adopted by the Court creates no exception for searches of nonresident aliens on the high seas. *See id.* (No indication that fourth amendment was intended to protect aliens in international waters).[4]

III. CONCLUSION

We find that Congress had the authority to enact the Maritime Drug Law Enforcement Act and that it is constitutionally applied to defendant. Furthermore, because the fourth amendment does not extend to the search of nonresident aliens on the high seas, no fourth amendment violation occurred in the search of the *Myth*. Davis' convictions are AFFIRMED.

[4] *Verdugo-Urquidez* applies retroactively to this appeal. We apply the Supreme Court's fourth amendment decisions to cases still pending on direct appeal unless they represent a "clear break with the past." *United States v. Gallop*, 694 F.2d 205, 207 (9th Cir. 1982). Because this court had not established any rule with regard to the applicability of the fourth amendment to searches on the high seas, *see Peterson*, 812 F.2d at 489 (merely assuming without deciding that fourth amendment protections apply on the high seas), our decision does not constitute a "clear break" with the past.

Appendix C

Not For Publication

United States Court of Appeals
For The Ninth Circuit

United States of America,
Plaintiff-Appellee,

v.

Peter Malcolm Davis,
Defendant-Appellant.

No. 88-1446
D.C. No. CR-87-0473-CAL
ORDER

[Filed July 6, 1990]

Before: Wiggins, Kozinski, Circuit Judges and Stotler, District Judge*

Appellant's petition for rehearing is denied.

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* Hon. Alicemarie H. Stotler, United States District Judge for the Central District of California, sitting by designation.

Appendix D

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Appendix E

46 U.S.C. § 1903*

§ 1903. Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels

(a) Vessels of United States or vessels subject to jurisdiction of United States

It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

(b) "Vessel of the United States" defined

For purposes of this section, a "vessel of the United States" means—

(1) a vessel documented under chapter 121 of Title 46 or a vessel numbered as provided in chapter 123 of that title;

(2) a vessel owned in whole or part by—

(A) the United States or a territory, commonwealth, or possession of the United States;

(B) a State or political subdivision thereof;

(C) a citizen or national of the United States; or

(D) a corporation created under the laws of the United States or any State, the District of Columbia, or any territory, commonwealth, or possession of the United States;

unless the vessel has been granted the nationality of a foreign nation in accordance with article 5 of the 1958 Convention on the High Seas; and

---

* Section 1903 has since been amended, but this is the statute as it read at the time of Peter Davis' arrest and indictment.

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was either sold to a person not a citizen of the United States or placed under foreign registry or a foreign flag, whether or not the vessel has been granted the nationality of a foreign nation.

(c) "Vessel subject to the jurisdiction of the United States" and "vessel without nationality" defined; claim of nationality or registry

(1) For purposes of this section, a "vessel subject to the jurisdiction of the United States" includes—

(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel located within the customs waters of the United States; and

(E) a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States.

Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under subparagraph (C) or (E) of this paragraph may be obtained by radio, telephone, or similar oral or electronic means, and may be proved by certification of the Secretary of State or the Secretary's designee.

(2) For purposes of this section, a "vessel without nationality" includes—

(A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed; and

(B) any vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel.

A claim of registry under subparagraph (A) may be verified or denied by radio, telephone, or similar oral or electronic means. The denial of such claim of registry by the claimed flag nation may be proved by certification of the Secretary of State or the Secretary's designee.

(3) For purposes of this section, a claim of nationality or registry only includes:

(A) possession on board the vessel and production of documents evidencing the vessel's nationality in accordance with article 5 of the 1958 Convention on the High Seas;

(B) flying its flag nation's ensign or flag; or

(C) a verbal claim of nationality or registry by the master or person in charge of the vessel.

(d) Claim of failure to comply with international law; jurisdiction of court

A claim of failure to comply with international law in the enforcement of this chapter may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter.

(e) Exceptions; burden of proof

This section does not apply to a common or contract carrier or an employee thereof, who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business or to a public vessel of the United States, or any person on board such a vessel who possesses or distributes a controlled substance in the lawful course of such person's duties, if the controlled substance is a part of the cargo entered in the vessel's manifest and is intended to be lawfully imported into the country of destination for scientific, medical, or other legitimate purposes. It shall not be necessary for the United States to negative the

exception set forth in this subsection in any complaint, information, indictment, or other pleading or in any trial or other proceeding. The burden of going forward with the evidence with respect to this exception is upon the person claiming its benefit.

(f) Jurisdiction and venue

Any person who violates this section shall be tried in the United States district court at the point of entry where that person enters the United States, or in the United States District Court of the District of Columbia.

(g) Penalties

(1) Any person who commits an offense defined in this section shall be punished in accordance with the penalties set forth in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960).

(2) Notwithstanding paragraph (1) of this subsection, any person convicted of an offense under this chapter shall be punished in accordance with the penalties set forth in section 1012 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 962) if such offense is a second or subsequent offense as defined in section 1012(b) of that Act.

(h) Extension beyond territorial jurisdiction of United States

This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.

(i) Definitions

The definitions in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) apply to terms used in this chapter.

(j) Attempt or conspiracy

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine, or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Appendix F

The British Secretary of State for Foreign and Commonwealth Affairs to the American Ambassador

Foreign and Commonwealth Office
London SWIA 2AH
13 November 1981

His Excellency
The Hounorable
John J. Louis Jr.
Embassy of the
(United States of America
Grosvenor Square
London WIA 1AE

Your Excellency:

I have the honour to refer to the recent discussions between representatives of our two Governments concerning the desire of the authorities of the United States to take more effective measures to suppress the unlawful importation of cannabis and other narcotic drugs into the United States.

Bearing in mind the special nature of this problem and having regard to the need for international co-operation in suppressing the illicit traffic in narcotic drugs, which is recognized in the Single Convention on Narcotic Drugs of 1961,[1] I have the honour to propose the following:

1. The Government of the United Kingdom of Great Britain an Northern Ireland agree that they will not object to the boarding by the authorities of the United States, outside the limits of the territorial sea and contigous zone of the United States and within the areas described in paragraph 9 below, of private vessels under the British flag in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States in violation of the laws of the United States.

---

[1] Done Mar. 30, 1961. TIAS 6298; 18 UST 1407.

2. On boarding the vessel the authorities of the United States may address enquiries to those on board, examine the ship's papers and take such other measures as are necessary to establish the place of registration of the vessel. When these measures suggest that an offence against the laws of the United States relative to the importation of narcotic drugs is being committed, the Government of the United Kingdom agreee that they will not object to the authorities of the United States instituting a search of the vessel.

3. If the authorities of the United States then believe that an offence against the laws referred to in paragraph 2 above is being committed, the Government of the United Kingdom agree that they will not object to the vessel being seized and taken into a United States port.

4. The Government of the United Kingdom may, within 14 days of the vessel's entry into port, object to the continued exercise of United States jurisdiction over the vessel for purposes of the laws referred to in paragraph 2 above, and the Government of the United States shall thereupon release the vessel without charge. The Government of the United States shall not institute forfeiture proceedings before the end of the period allowed for objections.

5. The Government of the United Kingdom may, within 30 days of the vessel's entry into port, object to the prosecutions of any United Kingdom national found on board the vessel, and the Government of the Untied States shall thereupon release such person. The Government of the United Kingdom agree that they will not otherwise object to the prosecution of any person found on board the vessel.

6. Any action by the authorities of the United States shall be taken in accordance with this Agreement and United States law.

7. In any case where a vessel under the British flag is boarded the authorities of the United States shall promptly inform the authorities of the United Kingdom of the action taken and shall keep them fully informed of any subsequent developments.

8. If any loss or injury is suffered as a result of any actions taken by the United States is contravention of these arrangements or any improper or unreasonable action taken by the United States pursuant thereto, representatives of the two Governments shall meet at the request of either to decide any questions relating to compensation. Representatives of the two Governments shall in any case meet from time to time to review the working of these arrangements.

9. The areas referred to in paragraph 1 above comprise the Gulf of Mexico, the Caribbean Sea, that portion of the Alantic Ocean West of longtitude 55° West and South of latitude 30° North and all other areas within 150 miles of the Alantic coast of the United States.

10. I have the honour to suggest that if the foregoing proposals are acceptable to the Government of the United States, this Note and Your Excellency's confirmation reply shall constitute as Agreement between the Government of the United Kingdom of Great Britian and Northern Ireland and the Government of the United States which shall enter into force on the date of your reply. It may be terminated by etiher Government on one month's notice but will continue to remain effective in respect of any proceedings based on action taken during it validity.

Accept, Excellency, the
renewed assurance of my
highest consideration.
(For the Secretary of State)

[2]

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[2] Michael St. E. Burton.

Appendix G

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RULSJGA/COGARD INTELCOORDGEN WASHINGTON DC
RUEADWW/OFC OF THE VICE PRESIDENT WHBIS WASH DC
RUEACUS/US CUSTOMS SERVICE WASHINGTON DC
RUEABHD/DEA HQS WASHINGTON DC
RUEBBEA/DEPT OF TRANSPORTATION WASHINGTON DC
RUEBWJA/DEPT OF JUSTICE WASHINGTON DC//H&DDS/EPC//
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UNCLAS E F T O FOUO (TRANSMIT VIA SECURE MEANS ONLY) //H16240//
SUBJ: LAW ENFORCEMENT— S/V MYTH OF ECURIE (UK)—SUSPECT
A. CCGDELEVEN 160400AZ JUN 87
B. CONFCALL BETWEEN COMDT(G-TGC) AT 1615302 JUN 87
1. HMG HAS VERIFIED REGISTRY OF SUBJ VESSEL AND HAS AUTHORIZED USG TO BOARD, SEARCH AND SEIZE, IF EVIDENCE WARRANTS, UNDER U.S. LAW. HMG

PAGE 02 RULSSGG2776 UNCLAS E F T O FOUO (TRANSMIT VIA SECURE MEANS HAS INDICATED THAT THE CONDITIONS AND TERMS CONTAINED IN 13 NOV 81 US/UK AGREEMENT WILL BE USED IN THIS CASE.

2. IN VIEW OF THE ABOVE, COMDT HAS NO OBJECTION TO TAKING ACTION AGAINST SUBJ VESSEL UNDER THE TERMS OF THE US/UK AGREEMENT.

3. INSURE AMEMBASSY LONDON IS INFO ADDEE ON ALL RELATED MSG TRAFFIC.

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No. 90-636

FILED
DEC 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

PETER MALCOLM DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the United States lacked jurisdiction over petitioner's British-registered vessel on the high seas.

2. Whether the Coast Guard's boarding and search of petitioner's vessel was conducted without statutory authority and in violation of the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-636

PETER MALCOLM DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A19-A31) is reported at 905 F.2d 245. The opinion of the district court (Pet. App. A1-A18) is reported at 678 F. Supp. 1437.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1990. The petition for rehearing was denied on July 6, 1990 (Pet. App. A32). The petition for a writ of certiorari was filed on October 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial on stipulated facts in the United States District Court for the Northern District of California, petitioner was convicted of two violations of the Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901 *et seq.*: possessing marijuana on a vessel subject to the jurisdiction of the United States with intent to distribute it, in violation of 46 U.S.C. App. 1903(a); and conspiring to commit that offense, in violation of 46 U.S.C. App. 1903(j). He was sentenced to ten years' imprisonment, to be followed by a four-year term of supervised release. The court of appeals affirmed. Pet. App. A19-A31.

1. On June 15, 1987, the Coast Guard cutter CAPE ROMAIN encountered the MYTH OF ECURIE, a sailing vessel about 58 feet long, approximately 35 miles southwest of Point Reyes, California. Pet. App. A2, A22. When first sighted, the MYTH was headed for San Francisco. *Ibid.* Coast Guard personnel aboard the CAPE ROMAIN radioed a request to the MYTH for permission to board it. *Ibid.* Petitioner, the captain of the MYTH, denied the request, claiming that the Coast Guard lacked jurisdiction over the vessel because it was of British registry and had departed from Hong Kong. *Ibid.* Petitioner also said that, although the MYTH had been bound for San Francisco, he was changing its destination and sailing instead to the Caribbean. *Id.* at A2, A17, A22, A26.

The Coast Guard officers suspected the MYTH of smuggling illegal drugs. Pet. App. A22. The basis for the officers' suspicion was that: (1) the MYTH was included on a list of vessels suspected of drug trafficking maintained by the Drug Enforcement Administration's El Paso Intelligence Center; (2) the MYTH was sighted in an area where sailing vessels of that size were seldom seen; (3) the

MYTH's purported point of departure was an unusual one for sailing vessels; (4) the bow of the MYTH was riding very low in the water, indicating that cargo was on board; and (5) the MYTH altered its course after it encountered the Coast Guard. *Id.* at A17, A22, A26-A27; Supp. E. R. 20.

Based on these observations, the Coast Guard requested permission from the government of the United Kingdom to board the MYTH. Pet. App. A2-A3, A22. The Coast Guard told British officials why it believed the MYTH was smuggling drugs. *Id.* at A22. In a teletype reply, the United Kingdom authorized the Coast Guard to board, search, and seize the MYTH in accordance with the procedures set forth in the Agreement on Narcotic Drugs; Interdiction of Vessels, Nov. 13, 1981, United States-Great Britain, 33 U.S.T. 4225, T.I.A.S. No. 10296. Pet. App. A3, A22, A28.

On June 16, 1987, Coast Guard officers from the CAPE ROMAIN boarded the MYTH, which was by then approximately 100 miles west of the California coast. Pet. App. A3. Upon boarding, the officer smelled marijuana in the MYTH's cabin. *Id.* at A17. Petitioner told the boarding officers that he kept a shotgun below deck. *Id.* at A3. When one of the boarding officers accompanied petitioner below to get the weapon, the officer saw numerous bales of material and noticed a heavy smell of marijuna. *Id.* at A3, A23. Petitioner admitted that the bales contained marijuana. *Id.* at A3. The Coast Guard officers then arrested petitioner and his crew and took the MYTH to the Coast Guard station in San Francisco, where a search of the vessel yielded 7,000 pounds of marijuana. *Ibid.*

2. Petitioner moved to dismiss the indictment for lack of jurisdiction and to suppress the evidence seized from the MYTH. The district court denied both motions. Pet. App. A1-A18.

3. The court of appeals upheld both rulings and affirmed petitioner's convictions. Pet. App. A19-A31.

The court rejected petitioner's contention that the United States could not assert jurisdiction over the MYTH because it was a foreign vessel on the high seas. Pet. App. A23-A27. The court determined that Congress could proscribe criminal conduct on the high seas by virtue of its constitutional power to "define and punish piracies and felonies on the high seas." *Id.* at A24 (quoting U.S. Const. Art. I, § 8, Cl. 10). The court further determined that Congress had exercised that power in the Maritime Drug Law Enforcement Act, which expressly applies to vessels "outside the territorial jurisdiction of the United States." Pet. App. A25 (quoting 46 U.S.C. App. 1903(h)). Finally, the court determined that application of the Act in this case comported with due process. Pet. App. A25-A26. The undisputed evidence indicated that petitioner "intended to smuggle contraband into United States territory." *Id.* at A26. That conduct established a sufficient nexus between petitioner and the United States such that application of the Act to petitioner "would not be arbitrary or fundamentally unfair." *Id.* at A25-A26 (citing *United States* v. *Peterson*, 812 F.2d 486, 493 (9th Cir. 1987)).

The court further held that the Act authorized the assertion of jurisdiction in this case. The court observed that the Act applies to vessels "located within the customs waters of the United States" (Pet. App. A27 (quoting 46 U.S.C. App. 1903(c)(1)(D)), and that "customs waters" exist when there is an "arrangement" between the United States and the flag country authorizing the United States "to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States" (Pet. App. A27 (quoting 19 U.S.C. 1401(j)). The court determined that such an arrangement was made in

this case: "[T]he [Coast Guard's] request for permission to board and the United Kingdom's reply telex constitute[d] an arrangement pursuant to section 1401(j)." Pet. App. A29.

The court rejected petitioner's argument that the Coast Guard lacked authority to conduct the boarding and search of the MYTH and that its actions violated the Fourth Amendment. The court held that the Coast Guard had statutory authority for these actions under 14 U.S.C. 89(a), which permits the Coast Guard to board, search, and seize any vessel "upon the high seas and waters over which the United States has jurisdiction." Pet. App. A30. The United States had jurisdiction over the MYTH, the court determined, by virtue of the arrangement between the United States and the United Kingdom. *Ibid.* The court further held that petitioner lacked standing to invoke the Fourth Amendment because, under *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), the Fourth Amendment does not apply to searches of nonresident aliens on the high seas. Pet. App. A30-A31.

ARGUMENT

1. Petitioner renews his contention (Pet. 7-12) that the United States lacked jurisdiction over the MYTH. The courts below properly rejected that contention.

Under the Maritime Drug Law Enforcement Act, the United States may assert jurisdiction over a foreign vessel on the high seas under either of two circumstances: when "the flag nation has consented or waived objection to enforcement of United States law by the United States"; or when the "vessel [is] located within the customs waters of the United States." 46 U.S.C. App. 1903(c)(1)(C) and (D). "[C]ustoms waters" include waters in which, by treaty or "other arrangement" with the flag nation, United States

authorities are permitted to exercise jurisdiction and enforce United States laws. 19 U.S.C. 1401(j).

Both of these circumstances obtained here. The United Kingdom expressly consented to the Coast Guard's boarding, search, and seizure of the MYTH. Pet. App. A3, A22, A41-A42. That action constituted both a waiver of objection to the United States' assertion of jurisdiction under 46 U.S.C. App. 1903(c)(1)(C) and an "arrangement" between the United Kingdom and the United States under 19 U.S.C. 1401(j). The court of appeals therefore correctly held (Pet. App. A27-A29) that the Act authorized the United States to assert jurisdiction over the MYTH.

Petitioner argues (Pet. 9-10) that the assertion of jurisdiction over the MYTH was invalid because the Coast Guard did not comply with the 1981 Agreement between the United States and the United Kingdom. Although the 1981 Agreement does not apply by its own force to interdictions in the Pacific Ocean (Pet. App. A40), the United Kingdom specified, when it consented to the boarding, search, and seizure of the MYTH in this case, that "the terms contained in 13 Nov 1981 Agreement will be used * * *." *Id.* at A41.

In pertinent part, the 1981 Agreement, 33 U.S.T. 4225-4226, provides as follows[1]:

> 1. The Government of the United Kingdom of Great Britain and Northern Ireland agree that they will not object to the boarding by the authorities of the United States, outside the limits of the territorial sea and contiguous zone of the United States and within the area described in paragraph 9 below, of private vessels under the British flag in any case in which those authorities reasonably believe that the

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[1] The Agreement is reproduced in its entirety at Pet. App. A38-A40.

vessel has on board a cargo of drugs for importation into the United States in violation of the laws of the United States.

2. On boarding the vessel the authorities of the United States may address enquiries to those on board, examine the ship's papers and take such other measures as are necessary to establish the place of registration of the vessel. When these measures suggest that an offence against the laws of the United States relative to the importation of narcotic drugs is being committed, the Government of the United Kingdom agree that they will not object to the authorities of the United States instituting a search of the vessel.

3. If the authorities of the United States then believe that an offence against the laws referred to in paragraph 2 above is being committed, the Government of the United Kingdom agree that they will not object to the vessel being seized and taken into a United States port.

4. The Government of the United Kingdom may, within 14 days of the vessel's entry into port, object to the continued exercise of United States jurisdiction over the vessel for purposes of the laws referred to in paragraph 2 above, and the Government of the United States shall thereupon release the vessel without charge. The Government of the United States shall not institute forfeiture proceedings before the end of the period allowed for objections.

5. The Government of the United Kingdom may, within 30 days of the vessel's entry into port, object to the prosecution of any United Kingdom national found on board the vessel, and the Government of the United States shall thereupon release such person.

> The Government of the United Kingdom agree that they will not otherwise object to the prosecution of any person found on board the vessel.

As an initial matter, petitioner lacks standing to invoke the 1981 Agreement. It is well settled that an individual has no standing to allege a violation of an international agreement unless the agreement expressly provides otherwise. *United States* v. *Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985). Nothing in the 1981 Agreement confers any private rights or affirmative defenses on individuals. On the contrary, Paragraphs 3, 4, and 5 of the Agreement give the right to object to an assertion of jurisdiction by the United States exclusively to the government of the United Kingdom. Moreover, Section 1903(d) of the Act explicitly provides that "[a] claim of failure to comply with international law in the enforcement of this chapter may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter." Pet. App. A39. Both the Act and the Agreement thus clearly preclude the arguments that petitioner seeks to present.

In any event, petitioner's arguments based on the 1981 Agreement are without merit. The Coast Guard fully complied with the Agreement in this case.

Petitioner argues (Pet. 10), first, that under Paragraph 1 of the Agreement the Coast Guard lacked reasonable suspicion to believe that the MYTH was smuggling illegal drugs. The courts below correctly rejected that argument. Upon encountering the MYTH, the Coast Guard determined that it was on the DEA's list of vessels suspected of drug trafficking. Pet. App. A22; Supp. E.R. 20, 22. In addition, the MYTH was found in an unusual location and reported an unusual point of departure for a vessel of its type; its bow was riding very low in the water, indicating

that it was carrying cargo; and it altered its course after it encountered the Coast Guard. Pet. App. A17, A22, A26-A27. As the court of appeals held, these factors "could reasonably lead a Coast Guard officer to believe the MYTH was smuggling contraband." *Id.* at A29.

Contrary to petitioner's assertion (Pet. 9), the Coast Guard was not required under Paragraph 1 to communicate the basis for its reasonable suspicion to the United Kingdom. Paragraph 1 authorizes United States authorities to board a British vessel when "those authorities" believe the vessel is importing drugs. Pet. App. A38. Paragraph 1 thus gives United States authorities sole responsibility for determining reasonable suspicion. Indeed, far from requiring the authorities in each case to convey the basis for their reasonable suspicion, Paragraph 1 does not even obligate the authorities to obtain consent in each case. The terms of Paragraph 1 are prospective; the provision itself constitutes consent. In any event, before boarding the MYTH, the Coast Guard officers told British officials why they suspected the vessel was smuggling contraband. Pet. App. A22; Supp. E.R. 20, 22. The factual premise for petitioner's argument is thus incorrect.

Petitioner is also incorrect in arguing (Pet. 9) that Paragraph 2 of the Agreement authorizes the boarding of a vessel only if necessary to determine the vessel's registry, and that the boarding in this case was improper because the MYTH's registry was confirmed prior to boarding. Although the Coast Guard determined the MYTH's registry before boarding it, the Coast Guard could not be certain of the vessel's identity until documentation on board the vessel was checked against its main beam number. Supp. E.R. 11. That is precisely what the Coast Guard officers did after boarding the MYTH. *Ibid.* The British government evidently does not share petitioner's

interpretation of the Agreement, since it consented to the boarding of the MYTH *after* confirming for the Coast Guard that the MYTH was registered in the United Kingdom. Pet. App. A38.

Petitioner is also incorrect in arguing (Pet. 9-10) that the 1981 Agreement required the Coast Guard after boarding the MYTH to contact the United Kingdom a second time to obtain its consent to search the vessel, and a third time to obtain its consent to arrest petitioner and seize the vessel. The government of the United Kingdom consented to the boarding, the search, and the enforcement of United States law with regard to the MYTH in a single transmittal.

The 1981 Agreement did not require that the Coast Guard contact British officials on three separate occasions. Under Paragraph 7 of the Agreement, United States authorities who have boarded a British vessel are required only to "promptly inform the authorities of the United Kingdom of the action taken" and to "keep them fully informed of any subsequent developments." Pet. App. A39. Paragraph 4 of the Agreement gives the United Kingdom 14 days *after* the entry of the vessel into port to object to its seizure, and Paragraph 5 gives it 30 days *after* that date to object to the prosecution of any British national found on the vessel. *Ibid.* Thus, the Agreement treats the search of a vessel and the enforcement of United States law with regard to the vessel like the boarding of the vessel: The Agreement provides consent to these actions prospectively, and it gives United States authorities sole discretion to take those actions, subject to later objection by the United Kingdom.

2. Petitioner further contends (Pet. 5-7) that the Coast Guard lacked authority to board and search the MYTH and that it took those actions in violation of the Fourth Amendment.

The court of appeals correctly held (Pet. App. A30) that the Coast Guard acted within its authority under 14 U.S.C. 89(a). That provision authorizes the Coast Guard to "go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance." As shown above, the MYTH was subject to the jurisdiction of the United States because it was within the "customs waters" of the United States.[2] Petitioner's challenge to the Coast Guard's authority is therefore without merit.

Likewise without merit is petitioner's Fourth Amendment challenge.[3] As numerous courts have held, government officers acting within their statutory authority may,

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[2] The boarding and search were also authorized by 19 U.S.C. 1581(a), which permits "officers of the customs" to board any vessel within the customs waters for the purpose of conducting a search. Under 19 U.S.C. 1401(j), as we have shown, the United Kingdom's consent to the boarding created customs waters around the MYTH. And, under 19 U.S.C. 1401(i), Coast Guard officers qualify as "officers of the customs." See *United States* v. *Reeh*, 780 F.2d 1541, 1546 (11th Cir. 1986).

[3] In rejecting petitioner's Fourth Amendment claim, the court of appeals relied on *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056 (1990). Pet. App. A30-A31. In *Verdugo-Urquidez*, this Court held that the Fourth Amendment does not apply to searches and seizures of the property of nonresident aliens in a foreign country. *Id.* at 1059. The court of appeals concluded that "the analysis and language adopted by the Court creates no exception for searches of nonresident aliens on the high seas." Pet. App. A31. In his petition for rehearing and again here (Pet. 5 & n.1), petitioner claims that he was a resident alien. Although the record on appeal establishes that petitioner is not a United States citizen, it does not indicate his resident status. Even if the holding of *Verdugo-Urquidez* is inapposite, however, petitioner's Fourth Amendment claim is without merit.

consistent with the Fourth Amendment, board a vessel on the high seas if they reasonably suspect that it is engaged in criminal activity. *United States* v. *Wright-Barker*, 784 F.2d 161, 176 (3d Cir. 1986); *United States* v. *Reeh*, 780 F.2d 1541, 1546-1547 (11th Cir. 1986); *United States* v. *Green*, 671 F.2d 46, 53 (1st Cir.), cert. denied, 457 U.S. 1135 (1982); *United States* v. *Streifel*, 665 F.2d 414, 422-423 (2d Cir. 1981); *United States* v. *Williams*, 617 F.2d 1063, 1076, 1084 (5th Cir. 1980) (en banc). As the courts below held, the Coast Guard officers had reasonable grounds to believe that the MYTH was carrying drugs for importation into the United States and were therefore entitled to board it. After boarding the MYTH, the officers were entitled to go below deck, where the marijuana was found, based on the odor of marijuana that they noticed upon boarding the vessel and the need to retrieve the firearm that petitioner stated he kept here. See *United States* v. *Humphrey*, 759 F.2d 743, 748 (9th Cir. 1985), cert. denied, 480 U.S. 917 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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